

SERVICE DATE – OCTOBER 5, 2017

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. NOR 42144¹

NORTH AMERICA FREIGHT CAR ASSOCIATION; AMERICAN FUEL &
PETROCHEMICALS MANUFACTURERS; THE CHLORINE INSTITUTE;
THE FERTILIZER INSTITUTE; AMERICAN CHEMISTRY COUNCIL;
ETHANOL PRODUCTS, LLC D/B/A POET ETHANOL PRODUCTS;
POET NUTRITION, INC.; AND CARGILL INCORPORATED

v.

UNION PACIFIC RAILROAD COMPANY

Docket No. NOR 42153

ARKEMA INC.

v.

UNION PACIFIC RAILROAD COMPANY

Digest:² This decision grants a motion filed by Union Pacific Railroad Company to consolidate a new complaint proceeding with an existing one.

Decided: October 3, 2017

BACKGROUND

On June 2, 2015, North America Freight Car Association, American Fuel & Petrochemicals Manufacturers, The Chlorine Institute, Inc., The Fertilizer Institute, American Chemistry Council, Ethanol Products, LLC d/b/a POET Ethanol Products, POET Nutrition, Inc., and Cargill Incorporated (collectively, NAFCA Complainants) filed an amended complaint in Docket No. NOR 42144 against Union Pacific Railroad Company (UP). NAFCA Complainants challenge the reasonableness of UP Tariff 6004, Item 55-C, which they allege “shifts the costs of transporting empty tank cars to and from repair facilities from UP to the providers of private tank cars, including [NAFCA Complainants], without compensating them for UP’s use of their cars.”

¹ This decision also embraces Valero Marketing & Supply Co. v. Union Pacific Railroad, NOR 42150, and Tesoro Refining & Marketing Co. v. Union Pacific Railroad, NOR 42152.

² The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. Policy Statement on Plain Language Digests in Decisions, EP 696 (STB served Sept. 2, 2010).

(Am. Compl. 6, June 2, 2015.) More broadly, NAFCA Complainants also allege that “UP’s refusal to compensate [NAFCA Complainants] for [the use of their tank cars], whether through mileage allowances or reduced line haul rates, constitutes an unreasonable practice under 49 U.S.C. § 10702, and is a violation of 49 U.S.C. §§ 11101, 11121, and 11122.” (*Id.* at 9.)

On June 22, 2015, UP moved to dismiss the amended complaint or make that complaint more definite. By decision served on December 21, 2015, the Board denied UP’s motion, and on June 10, 2016, the Board granted UP’s motion to hold the procedural schedule in abeyance pending the resolution of discovery disputes and further order of the Board.

In December 2016, Valero Marketing and Supply Company and Valero Rail Partners, LLC (collectively, Valero) and Tesoro Refining & Marketing Company LLC, Tesoro Great Plains Gathering & Marketing, LLC, and Dakota Prairie Refining, LLC (collectively, Tesoro) (NAFCA Complainants, Valero, and Tesoro are referred to collectively in this decision as Existing Complainants) filed complaints against UP in Docket Nos. NOR 42150 and NOR 42152, raising allegations substantially similar to those of NAFCA Complainants. On January 26, 2017, UP filed a motion to consolidate the NAFCA, Valero, and Tesoro complaint proceedings, which the Board granted in a decision served on March 31, 2017 (March 2017 Decision).

On August 1, 2017, Arkema Inc. (Arkema) filed a complaint against UP in Docket No. NOR 42153, raising substantially similar allegations to those of Existing Complainants. On August 9, 2017, UP filed a motion to consolidate Arkema’s complaint with the existing NAFCA, Valero, and Tesoro proceeding. Arkema filed a reply on August 29, 2017, stating that Arkema “takes no position individually” on UP’s motion and that Arkema defers to the complainants in the consolidated dockets. Also, on August 29, 2017, Existing Complainants replied in opposition to UP’s motion.³

DISCUSSION AND CONCLUSIONS

In deciding whether to grant a request for consolidation, the Board considers whether the proceedings involve common facts, issues, and parties; whether consolidation would promote efficiency; and whether consolidation would unduly delay the proceedings or prejudice any party. *See, e.g., Honey Creek R.R.—Pet. for Declaratory Order*, FD 34869, slip op. at 3 (STB served June 4, 2008). The Board has broad discretion to determine whether to take such a procedural action, and its decision to do so in any particular situation is highly dependent on the facts and circumstances of the case. *See, e.g., Pet. of Nat’l R.R. Passenger Corp. for Relief Pursuant to 49 U.S.C. § 24905*, FD 36048, slip op. at 4 (STB served Oct. 3, 2016).

³ On September 8, 2017, UP submitted a reply to complainants’ reply; UP calls this pleading a “supplement.” Tesoro submitted a reply on September 19, 2017, asking the Board to disregard UP’s reply to reply. Replies to replies are generally not permitted under 49 C.F.R. § 1104.13(c). However, in the interest of a more complete record, UP’s reply to reply will be accepted.

Here, the Board will exercise its discretion to grant the request for consolidation. UP correctly observes that the four dockets share common facts, issues, and parties. (UP Mot. 8, Aug. 9, 2017, NOR 42153.) Also, discovery is still ongoing in the existing dockets, as it was when the Board issued its previous consolidation decision. Although discovery in Docket No. NOR 42144 may be nearing completion, and discovery among UP, Valero, and Tesoro appears to be proceeding as quickly as possible, significant work remains to be done. See Existing Complainants Reply 4-6, Aug. 29, 2017, NOR 42144; see also N. Am. Freight Car Ass'n v. Union Pac. R.R., NOR 42144 et al. (STB served Oct. 3, 2017) (administrative law judge's order setting discovery deadlines, including a January 31, 2018 deadline for completion of discovery involving Valero and Tesoro). In particular, UP notes that Valero's and Tesoro's document productions to date have consisted primarily of copies of their lease agreements, and the parties are still discussing the scope of production as well as potential stipulations that would affect that scope. (See UP Mot. 7, Aug. 9, 2017, NOR 42153; Joint Weekly Status Report of Valero, Tesoro, and UP, Sept. 7, 2017, NOR 42144.)

At the same time, Arkema and UP have commenced their discovery process, requesting information and beginning negotiations to narrow discovery requests. (See UP Suppl. 2-4, Sept. 8, 2017, NOR 42153.) UP and Arkema appear to have made greater progress than the parties had made in discovery involving Valero and Tesoro at the point when the Board decided to consolidate Valero's and Tesoro's complaints into the existing docket. See UP Mot. to Compel 2-3, Feb. 24, 2017, NOR 42150 (Valero and Tesoro had not served objections to UP's discovery requests and had not served discovery requests on UP); March 2017 Decision, slip op. at 6 (denying UP motion to compel as moot because discovery involving Valero and Tesoro would proceed immediately). Thus, although some delay is possible as a result of consolidation, it is not at all certain that the delay will be significant, and it may turn out to be relatively small.

Moreover, the efficiency issue identified by UP, which the Board cited in its March 2017 Decision, remains a valid concern with respect to Arkema. See UP Mot. 11, Aug. 9, 2017, NOR 42153; March 2017 Decision, slip op. at 4 ("If the Board were to resolve the NAFCA docket first, and then discovery in the Valero or Tesoro dockets pointed toward a different resolution than that reached in NAFCA, it would be very inefficient for the Board to have to revisit or qualify the NAFCA decision at that point."). Existing Complainants argue that the discovery exchanged so far does not point toward differing resolutions among the consolidated cases. (Existing Complainants Reply 12, Aug. 29, 2017, NOR 42144.) That argument, however, incorporates an assumption as to what the resolution of the proceeding will be—a position that is premature given that it is unknown what evidence the parties will present and what arguments and counterarguments they will make. See N. Am. Freight Car Ass'n v. Union Pac. R.R., NOR 42144, slip op. at 3, 5 (STB served Dec. 21, 2015) (denying UP's motion to dismiss, based in part on complainants' argument that their complaint presents questions of fact that can only be resolved after discovery and the presentation of evidence).

Existing Complainants assert that UP's efficiency argument assumes that UP must have "complete information from all agents in the entire rail industry" to defend its actions. (Existing Complainants Reply 13, Aug. 29, 2017, NOR 42144.) This mischaracterizes UP's argument. UP does not assert that it requires information from all agents in the industry, including hundreds of non-parties. See id. Rather, the concern raised by UP is that Arkema in particular, having

initiated litigation with a very similar complaint, could produce information that points toward a different resolution in the consolidated proceeding. (UP Mot. 11, Aug. 9, 2017, NOR 42153.) If that information came to light after the existing dockets had advanced into the merits phase or the Board's decisionmaking, it would be inefficient for the parties or the Board to change course.

Existing Complainants also argue that consolidation poses a risk that information produced in discovery may begin to go stale, causing further delay and adding costs when the parties must update this information. (Existing Complainants Reply 10, Aug. 29, 2017, NOR 42144.) This argument assumes that consolidation will significantly delay the start of the merits phase. As discussed above, however, it is unclear how much delay consolidation would cause, given the relative states of discovery in the respective dockets.

In addition, Existing Complainants suggest that UP's motion to consolidate is an attempt to avoid adjudication of the legality of its conduct by engaging in "dilatory tactics." (Existing Complainants Reply 2, Aug. 29, 2017, NOR 42144.) But UP does not control whether new complaints raising issues that are very similar to the existing litigation are filed, or when they are filed.

Accordingly, the uncertain amount of delay that may result from consolidation is not enough to outweigh the commonalities among the proceedings and the efficiency issue raised by UP. For these reasons, the motion to consolidate will be granted.

It is ordered:

1. UP's motion to consolidate is granted.
2. UP's September 8, 2017 reply to reply is accepted into the record.
3. This decision is effective on its date of service.

By the Board, Board Members Begeman and Miller.